

July 9, 2001

**MEMORANDUM**

**SUBJECT:** Issuance of “Revised Model Administrative Order on Consent for Removal Actions”

**FROM:** Barry Breen, Director /s/  
Office of Site Remediation Enforcement

**TO:** Regional Counsel, Regions I-X  
Waste Management Division Directors, Regions I-X  
Office of Regional Counsel Branch Chiefs, Regions I-X  
Superfund Program Branch Chiefs, Regions I-X

We are pleased to issue the final version of the “Revised Model Administrative Order on Consent for Removal Actions.” This model supersedes the “Model Administrative Order on Consent for Removal Actions” issued on March 16, 1993, and is immediately effective. In view of the ever-growing demand on Trust Fund resources, it is our hope that an updated model will prove to be an effective tool in increasing the number of enforcement-lead removal actions.

We would like to thank all EPA and DOJ staff who assisted in the development of this model, particularly the members of the Lead Region Removal Workgroup. We encourage the Regions to incorporate use of this model into their removal programs.

If you have any questions about the model, please contact Janice Linett of the Regional Support Division at (202) 564-5131.

Attachment

cc: Lead Region Removal Workgroup Members  
Larry Reed, Acting Director, Office of Emergency and Remedial Response  
Lisa K. Friedman, Associate General Counsel for Solid Waste and Emergency Response,  
Office of General Counsel  
Bruce S. Gelber, Chief, Environmental Enforcement Section, Environment and Natural  
Resources Division, U.S. Department of Justice

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REVISED MODEL ADMINISTRATIVE ORDER ON CONSENT FOR  
REMOVAL ACTIONS**

**[NOTE: This model is designed for settlements involving performance of removal actions that meet the definition of “time-critical” under the “Superfund Removal Procedures: Revision Number Three” (OSWER Directive No. 9360.0-03B, February 1988). This model may be modified for use in non-time-critical removal action settlements. In such situations, users should refer to the “‘Practitioner’s Guide’ to Non-Time-Critical Removal Administrative Orders on Consent” (March 15, 2001), and the Revised Model RD/RA Consent Decree (June 15, 2001, or more recent update).]**

Date of Issuance: July 9, 2001

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this model or its internal implementing procedures.

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION \_\_\_\_

IN THE MATTER OF:  
[Site Name]  
[City or Town, County, State]

ADMINISTRATIVE ORDER ON  
CONSENT FOR REMOVAL ACTION

[Names of Respondents (if many, reference  
attached list)],

U.S. EPA Region \_\_\_\_  
CERCLA Docket No. \_\_\_\_

Respondents

Proceeding Under Sections 104, 106(a), 107  
and 122 of the Comprehensive  
Environmental Response, Compensation,  
and Liability Act, as amended, 42 U.S.C. §§  
9604, 9606(a), 9607 and 9622

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## **I. JURISDICTION AND GENERAL PROVISIONS**

1. This Administrative Order on Consent (“Order”) is entered into voluntarily by the United States Environmental Protection Agency (“EPA”) and [insert names or attach list of Respondents] (“Respondents”). This Order provides for the performance of a removal action by Respondents [and the reimbursement of certain response costs incurred by the United States]<sup>1</sup> at or in connection with the property located at [insert address or descriptive location of Site] in [City or Town, County, State], the “[insert name] Site” or the “Site.”

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622, as amended (“CERCLA”).

3. EPA has notified the State [Commonwealth] of \_\_\_\_\_ (the “State”) of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. EPA and Respondents recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Order do not constitute an admission of any liability. Respondents do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Order, the validity of the findings of facts, conclusions of law, and determinations in Sections IV and V of this Order. Respondents agree to comply with and be bound by the terms of this Order and further agree that they will not contest the basis or validity of this Order or its terms.

## **II. PARTIES BOUND**

5. This Order applies to and is binding upon EPA and upon Respondents and their [heirs,] successors and assigns. Any change in ownership or corporate status of a Respondent

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<sup>1</sup> This model assumes that Future Response Costs (as defined in Paragraph 8(g)) are being paid under the Order and provides optional language for recovery of Past Response Costs as well. If Past Response Costs are not included within the scope of the Order, do not include the following provisions: 1) Paragraph 8(i) (“Interim Response Costs” definition); 2) Paragraph 8(p) (“Past Response Costs” definition); 3) the bracketed insert pertaining to Past Response Costs in Paragraph 8(g) (“Future Response Costs” definition); 4) Paragraph 36 (Payment for Past Response Costs); 5) Paragraph 56, Alternative 1 (Covenant Not to Sue by EPA); 6) Section XXX (Public Comment); 7) the bracketed section on Attorney General Approval following Section XXX; and 8) the bracketed [Past Response Costs] in three provisions of the Order: Paragraph 58(b) (Reservation of Rights by EPA); Paragraph 60 (Covenant not to Sue by Respondents); and Paragraph 67 (“matters addressed” definition).

including, but not limited to, any transfer of assets or real or personal property shall not alter such Respondent's responsibilities under this Order.

6. Respondents are jointly and severally liable for carrying out all activities required by this Order. In the event of the insolvency or other failure of any one or more Respondents to implement the requirements of this Order, the remaining Respondents shall complete all such requirements.

7. Respondents shall ensure that their contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. Respondents shall be responsible for any noncompliance with this Order.

### **III. DEFINITIONS**

**[NOTE: The following list of definitions may be reduced or expanded as appropriate.]**

8. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Order or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. ["Action Memorandum"] ["Action Memorandum/Enforcement"] shall mean the EPA Action Memorandum relating to the Site signed on \_\_\_\_\_, by the Regional Administrator, EPA Region \_\_, or his/her delegate, and all attachments thereto. The ["Action Memorandum"] ["Action Memorandum/Enforcement"] is attached as Appendix \_\_.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

c. "Day" shall mean a calendar day. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

d. "Effective Date" shall be the effective date of this Order as provided in Section XXXII.

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

[f. "\_\_\_\_\_ " shall mean the [insert name of State pollution control agency or environmental protection agency] and any successor departments or agencies of the State.]

g. “Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Paragraph 23 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation) [, and] Paragraph 33 (emergency response) [if Paragraph 59 is included, insert, “, and Paragraph 59 (work takeover).”]. Future Response Costs shall also include all Interim Response Costs [if Past Response Costs are paid under the Order, insert, “, and all Interest on those Past Response Costs Respondents have agreed to reimburse under this Order that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from [insert date identified in Past Response Costs definition] to the Effective Date.”].

h. “Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

i. “Interim Response Costs” shall mean all costs, including direct and indirect costs, a) paid by the United States in connection with the Site between [insert date identified in Past Response Costs definition] and the Effective Date, or b) incurred prior to the Effective Date, but paid after that date.

**[NOTE: The following two definitions should be used as appropriate if the Order contains a waiver of contribution rights against de micromis parties as provided in Paragraph 62 and there is MSS or MSW at the Site.]**

j. “Municipal sewage sludge” shall mean any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage, and may include residue removed, all or in part, during the treatment of wastewater from manufacturing or processing operations, provided that such residue has essentially the same characteristics as residue removed during the treatment of domestic sewage.

k. “Municipal solid waste” shall mean household waste and solid waste collected from non-residential sources that is essentially the same as household waste. While the composition of such wastes may vary considerably, municipal solid waste generally is composed of large volumes of non-hazardous substances (*e.g.*, yard waste, food waste, glass, and aluminum) and can contain small amounts of other wastes as typically may be accepted in RCRA Subtitle D landfills.

l. “National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

m. “Order” shall mean this Administrative Order on Consent and all appendices attached hereto (listed in Section XXXI). In the event of conflict between this Order and any appendix, this Order shall control.

n. “Paragraph” shall mean a portion of this Order identified by an Arabic numeral.

o. “Parties” shall mean EPA and Respondents.

p. “Past Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through [insert date of most recent cost update], plus Interest on all such costs through such date.

q. “RCRA” shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

r. “Respondents” shall mean those Parties identified in Appendix \_\_\_\_.

s. “Section” shall mean a portion of this Order identified by a Roman numeral.

t. “Site” shall mean the \_\_\_\_\_ Superfund Site, encompassing approximately \_\_\_\_ acres, located at [address or description of location] in [insert name of City, County, State] and depicted generally on the map attached as Appendix \_\_\_\_.

[u. “State” [or “Commonwealth”] shall mean the State [or Commonwealth] of \_\_\_\_\_.]

[v. “Statement of Work” or “SOW” shall mean the statement of work for implementation of the removal action[, as set forth in Appendix \_\_\_\_ to this Order,] and any modifications made thereto in accordance with this Order.]

w. “Waste Material” shall mean 1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); 3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and 4) any “hazardous material” under [insert appropriate State statutory citation].

x. “Work” shall mean all activities Respondents are required to perform under this Order.

#### **IV. FINDINGS OF FACT**

**[NOTE: Because Findings of Fact are site-specific, no model language is provided. Facts should be presented concisely, accurately, and logically. Regions should include a**

discussion of the following points: identification of Respondents; site location and description; site history and operations; site ownership; enforcement history; general categories of Respondents' liability; past EPA and/or State activities and investigations; and conditions and data showing hazardous substances are present and releases or threats of releases exist. The Order need not contain a finding of endangerment if such a finding has been properly made and documented in an Action Memorandum (or Action Memorandum/Enforcement) (hereinafter referred to as an "Action Memorandum/Enforcement") in accordance with the "Superfund Removal Procedures Action Memorandum Guidance" (OSWER Directive No. 9360.3-01, December 1990). If such a finding has not been made in an Action Memorandum/Enforcement, this Section should include data showing that the releases or threats of releases may present an imminent and substantial endangerment, *e.g.*, exposure routes, risk assessment, affected populations, environmental harm, potential for fire or explosion, or other dangers, and should be supported by an administrative record. If such a finding has been made in an Action Memorandum/Enforcement (and is not being made in the Order as well), the date of the signing of the Action Memorandum/Enforcement should be included as a finding, and the Action Memorandum/Enforcement should be attached and incorporated by reference into the Order.]

## **V. CONCLUSIONS OF LAW AND DETERMINATIONS**

9. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, EPA has determined that:

a. The [insert name] Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The contamination found at the Site, as identified in the Findings of Fact above, includes [a] "hazardous substance(s)" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

c. Each Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. Each Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for performance of response action and for response costs incurred and to be incurred at the Site. [Regions should specify each category of liability under Section 107. For example:

- i. Respondents [insert names] are the "owner(s)" and/or "operator(s)" of the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

- ii. Respondents [insert names] were the “owners” and/or “operators” of the facility at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).
- iii. Respondents [insert names] arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances at the facility, within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).
- iv. Respondents [insert names] accept or accepted hazardous substances for transport to the facility, within the meaning of Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4).]

e. The conditions described in [Paragraphs \_\_ of] the Findings of Fact above constitute an actual or threatened “release” of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

f. The removal action required by this Order is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Order, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

## **VI. ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered and Agreed that Respondents shall comply with all provisions of this Order, including, but not limited to, all attachments to this Order and all documents incorporated by reference into this Order.

## **VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR**

10. Respondents shall retain one or more contractors to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within \_\_ days of the Effective Date. Respondents shall also notify EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least \_\_ days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondents. If EPA disapproves of a selected contractor, Respondents shall retain a different contractor and shall notify EPA of that contractor’s name and qualifications within \_\_ days of EPA’s disapproval. **[NOTE: Unless the removal work is being performed under emergency circumstances or is non-complex, the proposed contractor must demonstrate compliance with ANSI/ASQC E-4-1994, “Specifications and Guidelines for Quality Systems for Environmental Data Collection and**

**Environmental Technology Programs” (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor’s Quality Management Plan (“QMP”). The QMP should be prepared in accordance with “EPA Requirements for Quality Management Plans (QA/R-2)” (EPA/240/B0-1/002), or equivalent documentation as required by EPA. Any decision not to require submission of the contractor’s QMP should be documented in a memorandum from the OSC and Regional QA personnel to the Site file.]**

11. Within \_\_ days after the Effective Date, Respondents shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondents required by this Order and shall submit to EPA the designated Project Coordinator’s name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondents shall retain a different Project Coordinator and shall notify EPA of that person’s name, address, telephone number, and qualifications within \_\_ days following EPA’s disapproval. Receipt by Respondents’ Project Coordinator of any notice or communication from EPA relating to this Order shall constitute receipt by all Respondents.

12. EPA has designated \_\_\_\_\_ of the [insert Regional Office, *e.g.*, Emergency and Enforcement Response Branch, Region \_\_], as its On-Scene Coordinator (“OSC”). Except as otherwise provided in this Order, Respondents shall direct all submissions required by this Order to the OSC at [insert OSC’s address]. **[NOTE: Regions may specify method of delivery, *e.g.*, by certified mail, express mail, or other delivery method.]**

13. EPA and Respondents shall have the right, subject to Paragraph 11, to change their respective designated OSC or Project Coordinator. Respondents shall notify EPA \_\_ days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

## **VIII. WORK TO BE PERFORMED**

14. Respondents shall perform, at a minimum, all actions necessary to implement the [Action Memorandum/Enforcement] [Statement of Work]. The actions to be implemented generally include, but are not limited to, the following:

**[NOTE: This Section should provide a brief description consistent with the Action Memorandum/Enforcement and should provide sufficient detail to permit Respondents to draft a Work Plan. Regions should ensure that the description is sufficiently broad and does not unintentionally limit removal actions in terms of hazardous substances to be addressed or to site boundaries if hazardous substances are present or migrate beyond boundaries to be addressed. Regions may append their own Statement of Work or Work Plan; if this situation occurs, modify Paragraph 15 as appropriate.]**

15. Work Plan and Implementation.

a. Within \_\_ days after the Effective Date, Respondents shall submit to EPA for approval a draft Work Plan for performing the removal action generally described in Paragraph 14 above. The draft Work Plan shall provide a description of, and an expeditious schedule for, the actions required by this Order. **[NOTE: EPA shall require preparation of a Quality Assurance Project Plan (“QAPP”) as part of the Work Plan except in circumstances involving emergency or non-complex removal work. The QAPP should be prepared in accordance with “EPA Requirements for Quality Assurance Project Plans (QA/R-5)” (EPA/240/B-01/003, March 2001), and “EPA Guidance for Quality Assurance Project Plans (QA/G-5)” (EPA/600/R-98/018, February 1998).]**

b. EPA may approve, disapprove, require revisions to, or modify the draft Work Plan in whole or in part. If EPA requires revisions, Respondents shall submit a revised draft Work Plan within \_\_ days of receipt of EPA’s notification of the required revisions. Respondents shall implement the Work Plan as approved in writing by EPA in accordance with the schedule approved by EPA. Once approved, or approved with modifications, the Work Plan, the schedule, and any subsequent modifications shall be incorporated into and become fully enforceable under this Order.

c. Respondents shall not commence any Work except in conformance with the terms of this Order. Respondents shall not commence implementation of the Work Plan developed hereunder until receiving written EPA approval pursuant to Paragraph 15(b).

**[NOTE: If a planning period of at least 6 months exists, EPA shall require the performance of an Engineering Evaluation/Cost Analysis (“EE/CA”) as required by the NCP at 40 C.F.R. § 300.415(b)(4).]**

16. Health and Safety Plan. Within \_\_ days after the Effective Date, Respondents shall submit for EPA review and comment a plan that ensures the protection of the public health and safety during performance of on-Site work under this Order. This plan shall be prepared in accordance with EPA’s Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration (“OSHA”) regulations found at 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan shall also include contingency planning. **[NOTE: Regions may provide more detail, e.g., SPCC, evacuation plans, etc.]** Respondents shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the pendency of the removal action.

17. Quality Assurance and Sampling.

a. All sampling and analyses performed pursuant to this Order shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control (“QA/QC”), data validation, and chain of custody procedures. Respondents shall ensure that the

laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance. Respondents shall follow, as appropriate, “Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures” (OSWER Directive No. 9360.4-01, April 1, 1990), as guidance for QA/QC and sampling. **[NOTE: Regions should also check with Regional QA officers for standard operating procedures for QA/QC and sampling of soil, air, ecology, waste and water.]** Respondents shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, “Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs” (American National Standard, January 5, 1995), and “EPA Requirements for Quality Management Plans (QA/R-2) (EPA/240/B-01/002, March 2001),” or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (“NELAP”) as meeting the Quality System requirements.

b. Upon request by EPA, Respondents shall have such a laboratory analyze samples submitted by EPA for QA monitoring. Respondents shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

c. Upon request by EPA, Respondents shall allow EPA or its authorized representatives to take split and/or duplicate samples. Respondents shall notify EPA not less than \_\_\_ days in advance of any sample collection activity, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Respondents to take split or duplicate samples of any samples it takes as part of its oversight of Respondents’ implementation of the Work.

18. Post-Removal Site Control. In accordance with the Work Plan schedule, or as otherwise directed by EPA, Respondents shall submit a proposal for post-removal site control consistent with Section 300.415(*l*) of the NCP and OSWER Directive No. 9360.2-02. Upon EPA approval, Respondents shall implement such controls and shall provide EPA with documentation of all post-removal site control arrangements.

#### 19. Reporting.

a. Respondents shall submit a written progress report to EPA concerning actions undertaken pursuant to this Order every \_\_\_th day after the date of receipt of EPA’s approval of the Work Plan until termination of this Order, unless otherwise directed in writing by the OSC. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems. **[NOTE: The frequency and content of these reports may be determined on a site-specific basis.]**

b. Respondents shall submit \_\_\_ copies of all plans, reports or other submissions required by this Order, [the Statement of Work], or any approved work plan. Upon request by EPA, Respondents shall submit such documents in electronic form.

c. Respondents who own or control property at the Site shall, at least 30 days prior to the conveyance of any interest in real property at the Site, give written notice to the transferee that the property is subject to this Order and written notice to EPA [and the State] of the proposed conveyance, including the name and address of the transferee. Respondents who own or control property at the Site also agree to require that their successors comply with the immediately proceeding sentence and Sections IX (Site Access) and X (Access to Information).

20. Final Report. Within \_\_\_ days after completion of all Work required by this Order, Respondents shall submit for EPA review [and approval] a final report summarizing the actions taken to comply with this Order. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled “OSC Reports.” **[NOTE: For removals that are more extensive, Regions may require compliance with “Superfund Removal Procedures: Removal Response Reporting – POLREPS and OSC Reports” (OSWER Directive No. 9360.3-03, June 1, 1994).]** The final report shall include a good faith estimate of total costs or a statement of actual costs incurred in complying with the Order, a listing of quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action (e.g., manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

“Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

## 21. Off-Site Shipments.

a. Respondents shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility’s state and to the On-Scene Coordinator. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

i. Respondents shall include in the written notification the following information: 1) the name and location of the facility to which the Waste Material is to be shipped; 2) the type and quantity of the Waste Material to be shipped; 3) the expected schedule

for the shipment of the Waste Material; and 4) the method of transportation. Respondents shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

ii. The identity of the receiving facility and state will be determined by Respondents following the award of the contract for the removal action. Respondents shall provide the information required by Paragraph 21(a) and 21(b) as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

b. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-site location, Respondents shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondents shall only send hazardous substances, pollutants, or contaminants from the Site to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

## **IX. SITE ACCESS**

22. If the Site, or any other property where access is needed to implement this Order, is owned or controlled by any of the Respondents, such Respondents shall, commencing on the Effective Date, provide EPA [the State], and its [their] representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Order.

23. Where any action under this Order is to be performed in areas owned by or in possession of someone other than Respondents, Respondents shall use their best efforts to obtain all necessary access agreements within \_\_ days after the Effective Date, or as otherwise specified in writing by the OSC. Respondents shall immediately notify EPA if after using their best efforts they are unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondents shall describe in writing their efforts to obtain access. EPA may then assist Respondents in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondents shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Response Costs).

**[NOTE: If EPA determines that land/water use restrictions are needed on property owned by settling or non-settling landowners, or that a property interest running with the land (granting either a right of access or a right to enforce land/water use restrictions) should be acquired from settling or non-settling landowners, look to the model language included in Section IX of the Revised Model RD/RA Consent Decree (June 15, 2001, or more recent update).]**

24. Notwithstanding any provision of this Order, EPA [and the State] retain[s] all of its [their] access authorities and rights [if land/water use restrictions are included, insert “, as well as all of its [their] rights to require land/water use restrictions”], including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

## **X. ACCESS TO INFORMATION**

25. Respondents shall provide to EPA [and the State], upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondents shall also make available to EPA [and the State], for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

26. Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to EPA [and the State] under this Order to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA [and the State], or if EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents.

27. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondents assert such a privilege in lieu of providing documents, they shall provide EPA [and the State] with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

28. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

## **XI. RECORD RETENTION**

29. Until 10 years after Respondents' receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), each Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until 10 years after Respondents' receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), Respondents shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

30. At the conclusion of this document retention period, Respondents shall notify EPA [and the State] at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA [or the State], Respondents shall deliver any such records or documents to EPA [or the State]. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege, they shall provide EPA [or the State] with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

31. Each Respondent hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by EPA or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

## **XII. COMPLIANCE WITH OTHER LAWS**

32. Respondents shall perform all actions required pursuant to this Order in accordance with all applicable local, state, and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Order shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARs") under federal environmental or state environmental or facility siting laws. [Respondents shall identify ARARs in the Work Plan subject to EPA approval.]

### **XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES**

33. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondents shall immediately take all appropriate action. Respondents shall take these actions in accordance with all applicable provisions of this Order, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondents shall also immediately notify the OSC or, in the event of his/her unavailability, the Regional Duty Officer [insert Regional Office, *e.g.*, Emergency Planning and Response Branch, EPA Region, telephone number, and the EPA Regional Emergency 24-hour telephone number] of the incident or Site conditions. In the event that Respondents fail to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Respondents shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XV (Payment of Response Costs).

34. In addition, in the event of any release of a hazardous substance from the Site, Respondents shall immediately notify the OSC at [insert Regional spill phone number] and the National Response Center at (800) 424-8802. Respondents shall submit a written report to EPA within 7 days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

### **XIV. AUTHORITY OF ON-SCENE COORDINATOR**

35. The OSC shall be responsible for overseeing Respondents' implementation of this Order. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any Work required by this Order, or to direct any other removal action undertaken at the Site. Absence of the OSC from the Site shall not be cause for stoppage of work unless specifically directed by the OSC.

### **XV. PAYMENT OF RESPONSE COSTS**

[36. Payment for Past Response Costs.

a. Within 30 days after the Effective Date, Respondents shall pay to EPA \$ \_\_\_ for Past Response Costs. **[NOTE: The following language should be used if the payment amount is above \$10,000. Regional attorneys should consult with the Comptroller's Office in the Region to determine if more specific EFT instructions should be included.]** Payment shall be made to EPA by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures to be provided to Respondents by EPA Region \_\_\_, and shall be accompanied by a statement identifying the name and address of the party(ies) making payment, the Site name, the

EPA Region and Site/Spill ID Number \_\_\_\_\_, and the EPA docket number for this action.]

**[NOTE: The following language may be used if the payment amount is below \$10,000.]**

Payment shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." Each check, or a letter accompanying each check, shall identify the name and address of the party(ies) making payment, the Site name, the EPA Region and Site/Spill ID Number \_\_\_\_\_, and the EPA docket number for this action, and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

b. At the time of payment, Respondents shall send notice that such payment has been made to:

[Insert names and mailing addresses of Regional Attorney or OSC and contact in Regional Comptroller's Office]

c. The total amount to be paid by Respondents pursuant to Paragraph 36(a) shall be deposited in the [Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.]

**[NOTE ON SPECIAL ACCOUNTS: Payments for Past Response Costs and Future Response Costs made under this Section may be deposited either in the EPA Hazardous Substance Superfund or in a site-specific special account within the EPA Hazardous Substance Superfund. Under Subparagraph 36(c) as written, 100% of Past Response Costs will be deposited in a site-specific special account. The following language may be substituted if all or part of the Past Response Costs will be deposited instead into the EPA Hazardous Substance Superfund:**

**[If the entire payment will be deposited in the EPA Hazardous Substance Superfund:]**

The total amount to be paid by Respondents pursuant to Paragraph 36(a) shall be deposited in the EPA Hazardous Substance Superfund.

**[If the payment will be split between the EPA Hazardous Substance Superfund and a special account:]**

Of the total amount to be paid by Respondents pursuant to Paragraph 36(a), ['\$\_\_\_\_\_' or '\_\_\_\_%'] shall be deposited in the EPA Hazardous Substance Superfund and ['\$\_\_\_\_\_' or '\_\_\_\_%'] shall be deposited in the [Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

37. Payments for Future Response Costs.

a. Respondents shall pay EPA all Future Response Costs not inconsistent with the NCP. On a periodic basis, EPA will send Respondents a bill requiring payment that includes a [insert name of standard Regionally-prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors. Also insert name of DOJ-prepared cost summary, which would reflect costs incurred by DOJ and its contractors, if any]. Respondents shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 39 of this Order.

b. Respondents shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party(ies) making payment and EPA Site/Spill ID number \_\_\_\_\_. Respondents shall send the check(s) to:

[Insert appropriate Regional Superfund Lockbox number and address]

**[NOTE: Regions may substitute EFT payment instructions.]**

c. At the time of payment, Respondents shall send notice that payment has been made to [insert names and mailing addresses of the Regional Financial Management Officer and any other receiving officials at EPA].

d. The total amount to be paid by Respondents pursuant to Paragraph 37(a) shall be deposited in the [Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund. **[NOTE: If some or all Future Response Cost payments will be deposited in the EPA Hazardous Substance Superfund, rather than in a special account, substitute the applicable alternative language shown in the note following Paragraph 36(c) above.]**

38. In the event that the payment for Past Response Costs is not made within 30 days of the Effective Date, or the payments for Future Response Costs are not made within 30 days of Respondents' receipt of a bill, Respondents shall pay Interest on the unpaid balance. The Interest on Past Response Costs shall begin to accrue on the Effective Date and shall continue to accrue until the date of payment. The Interest on Future Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondents' failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVIII.

39. Respondents may dispute all or part of a bill for Future Response Costs submitted under this Order, if Respondents allege that EPA has made an accounting error, or if Respondents allege that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before

payment is due, Respondents shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 37 on or before the due date. Within the same time period, Respondents shall pay the full amount of the contested costs into an interest-bearing escrow account. Respondents shall simultaneously transmit a copy of both checks to the persons listed in Paragraph 37(c) above. Respondents shall ensure that the prevailing party or parties in the dispute shall receive the amount upon which they prevailed from the escrow funds plus interest within \_\_ days after the dispute is resolved.

## **[XVI. DISPUTE RESOLUTION]<sup>2</sup>**

**[NOTE: The Regions should develop a record for the dispute and its resolution.]**

[40. Unless otherwise expressly provided for in this Order, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Order. The Parties shall attempt to resolve any disagreements concerning this Order expeditiously and informally.

41. If Respondents object to any EPA action taken pursuant to this Order, including billings for Future Response Costs, they shall notify EPA in writing of their objection(s) within \_\_ days of such action, unless the objection(s) has/have been resolved informally. EPA and Respondents shall have \_\_ days from EPA's receipt of Respondents' written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA.

42. Any agreement reached by the parties pursuant to this Section shall be in writing and shall, upon signature by both parties, be incorporated into and become an enforceable part of this Order. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the [insert Region-specific] level or higher will issue a written decision on the dispute to Respondents. EPA's decision shall be incorporated into and become an enforceable part of this Order. Respondents' obligations under this Order shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.]

## **XVII. FORCE MAJEURE**

43. Respondents agree to perform all requirements of this Order within the time limits established under this Order, unless the performance is delayed by a *force majeure*. For purposes of this Order, a *force majeure* is defined as any event arising from causes beyond the control of Respondents, or of any entity controlled by Respondents, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this

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<sup>2</sup> If Section XVI is not included, conforming changes are needed to Paragraphs 39, 50, 52, 54, 59, 74 and 75.

Order despite Respondents' best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work[,] [or] increased cost of performance [insert, if applicable, “, or a failure to attain [performance standards/action levels] set forth in the Action Memorandum/Enforcement.”].

44. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a *force majeure* event, Respondents shall notify EPA orally within [insert period of time] of when Respondents first knew that the event might cause a delay. Within \_\_\_ days thereafter, Respondents shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondents' rationale for attributing such delay to a *force majeure* event if they intend to assert such a claim; and a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondents from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

45. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Order that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Respondents in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

### **XVIII. STIPULATED PENALTIES**

46. Respondents shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 47 and 48 for failure to comply with the requirements of this Order specified below, unless excused under Section XVII (*Force Majeure*). “Compliance” by Respondents shall include completion of the activities under this Order or any work plan or other plan approved under this Order identified below in accordance with all applicable requirements of law, this Order, [the SOW,] and any plans or other documents approved by EPA pursuant to this Order and within the specified time schedules established by and approved under this Order.

#### **47. Stipulated Penalty Amounts - Work.**

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 47(b):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ _____	1st through 14th day
\$ _____	15th through 30th day
\$ _____	31st day and beyond

b. Compliance Milestones

[List violations or compliance milestones, including due dates for payments]

48. Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports [or other written documents] pursuant to Paragraphs \_\_\_\_\_ :

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ _____	1st through 14th day
\$ _____	15th through 30th day
\$ _____	31st day and beyond

**[NOTE: If Paragraph 59 (Work Takeover) is included, insert the following paragraph.]**

[49. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 59 of Section XX, Respondents shall be liable for a stipulated penalty in the amount of \_\_\_\_\_.]

50. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: 1) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondents of any deficiency; and 2) with respect to a decision by the EPA Management Official at the [insert Region-specific] level or higher, under Paragraph 42 of Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

51. Following EPA's determination that Respondents have failed to comply with a requirement of this Order, EPA may give Respondents written notification of the failure and describe the noncompliance. EPA may send Respondents a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondents of a violation.

52. All penalties accruing under this Section shall be due and payable to EPA within 30 days of Respondents' receipt from EPA of a demand for payment of the penalties, unless Respondents invoke the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made

payable to “EPA Hazardous Substances Superfund,” shall be mailed to [insert the Regional Lockbox number and address], shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID Number \_\_\_\_, the EPA Docket Number \_\_\_\_, and the name and address of the party(ies) making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA as provided in Paragraph 12, and to [insert the names and mailing addresses of any other receiving officials at EPA].

53. The payment of penalties shall not alter in any way Respondents’ obligation to complete performance of the Work required under this Order.

54. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of EPA’s decision.

55. If Respondents fail to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondents shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 52. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondents’ violation of this Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Order [if Paragraph 59 (Work Takeover) is included, insert, “or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XX, Paragraph 59.”]. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Order.

## **XIX. COVENANT NOT TO SUE BY EPA**

**[NOTE: Use Paragraph 56, Alternative 1, if the Order requires payment of Past Response Costs and Future Response Costs.]**

56. **[Alternative 1]** In consideration of the actions that will be performed and the payments that will be made by Respondents under the terms of this Order, and except as otherwise specifically provided in this Order, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for performance of the Work and for recovery of Past Response Costs and Future Response Costs. This covenant not to sue shall take effect upon receipt by EPA of the Past Response Costs due under Section XV of this Order and any Interest or Stipulated Penalties due for failure to pay Past Response Costs as required by Sections XV and XVIII of this Order. This covenant not to sue is conditioned upon the complete and satisfactory performance by

Respondents of their obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XV. This covenant not to sue extends only to Respondents and does not extend to any other person.

**[NOTE: Use Paragraph 56, Alternative 2, if the Order requires payment of Future Response Costs only.]**

56. **[Alternative 2]** In consideration of the actions that will be performed and the payments that will be made by Respondents under the terms of this Order, and except as otherwise specifically provided in this Order, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for performance of the Work and for recovery of Future Response Costs. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Respondents of all obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XV. This covenant not to sue extends only to Respondents and does not extend to any other person.

## **XX. RESERVATIONS OF RIGHTS BY EPA**

57. Except as specifically provided in this Order, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

58. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Order is without prejudice to, all rights against Respondents with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Respondents to meet a requirement of this Order;
- b. liability for costs not included within the definition[s] of [Past Response Costs or] Future Response Costs;
- c. liability for performance of response action other than the Work;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and

g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

[59. Work Takeover. In the event EPA determines that Respondents have ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in their performance of the Work, or are implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. Respondents may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Respondents shall pay pursuant to Section XV (Payment of Response Costs). Notwithstanding any other provision of this Order, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.]

## **XXI. COVENANT NOT TO SUE BY RESPONDENTS**

60. Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, [Past Response Costs,] Future Response Costs, or this Order, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the [State] Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

Except as provided in Paragraph 62 (Waiver of Claims), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 58 (b), (c), and (e) - (g), but only to the extent that Respondents' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

61. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

62. Respondents agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Respondents with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if

**[Use Subparagraphs a and b if there is MSW or MSS at the Site.]**

a. any materials contributed by such person to the Site constituting Municipal Solid Waste ("MSW") or Municipal Sewage Sludge ("MSS") did not exceed 0.2% of the total volume of waste at the Site; and

b. any materials contributed by such person to the Site containing hazardous substances, but not constituting MSW or MSS, did not exceed the greater of i) 0.002% of the total volume of waste at the Site, or ii) 110 gallons of liquid materials or 200 pounds of solid materials.

**[Use Subparagraph c if there is no MSW or MSS at the Site.]**

c. the materials contributed by such person to the Site containing hazardous substances did not exceed the greater of i) 0.002% of the total volume of waste at the Site, or ii) 110 gallons of liquid materials or 200 pounds of solid materials.

**[Use Subparagraph d in all cases.]**

d. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Site by such person contributed or could contribute significantly to the costs of response at the Site. [This waiver also shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person if such person asserts a claim or cause of action relating to the Site against such Respondent.]<sup>3</sup>

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<sup>3</sup> For guidance on use of contribution waivers, see "Inclusion of Contribution Waiver by Private Parties in CERCLA Administrative and Judicial Settlements" (Breen/Gelber, October 2, 1998).

**[Use as appropriate if a *de minimis* settlement has been concluded at the Site.]**

63. Respondents agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person that has entered into a final *de minimis* settlement under Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), with EPA with respect to the Site as of the Effective Date. [This waiver shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person if such person asserts a claim or cause of action relating to the Site against such Respondent.]

## **XXII. OTHER CLAIMS**

64. By issuance of this Order, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents. The United States or EPA shall not be deemed a party to any contract entered into by Respondents or their directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order.

65. Except as expressly provided in Section XXI, Paragraph[s] 62 [and 63] (De Micromis [and *De Minimis*] Waivers) and Section XIX (Covenant Not to Sue by EPA), nothing in this Order constitutes a satisfaction of or release from any claim or cause of action against Respondents or any person not a party to this Order, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

66. No action or decision by EPA pursuant to this Order shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

## **XXIII. CONTRIBUTION PROTECTION**

67. The Parties agree that Respondents are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for “matters addressed” in this Order. The “matters addressed” in this Order are the Work [, Past Response Costs,] and Future Response Costs. Except as provided in Section XXI, Paragraph[s] 62 [and 63], of this Order (De Micromis [and *De Minimis*] Waivers), nothing in this Order precludes the United States or Respondents from asserting any claims, causes of action, or demands against any persons not parties to this Order for indemnification, contribution, or cost recovery.

## **XXIV. INDEMNIFICATION**

68. Respondents shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of

Respondents, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Order. In addition, Respondents agree to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Order. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondents in carrying out activities pursuant to this Order. Neither Respondents nor any such contractor shall be considered an agent of the United States.

69. The United States shall give Respondents notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondents prior to settling such claim.

70. Respondents waive all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondents shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

## **XXV. INSURANCE**

**[NOTE: In cases where Respondents demonstrate that they do not have funds sufficient both to fund the removal and to obtain the optimal insurance policy, or in cases where EPA is confident that insurable risks are minimal, or if Respondents have the financial capacity to self-insure, and agree to do so, Regions may consider amending the Order to reduce policy limits or to waive the insurance requirement.]**

71. At least 7 days prior to commencing any on-Site work under this Order, Respondents shall secure, and shall maintain for the duration of this Order, comprehensive general liability insurance and automobile insurance with limits of \_\_\_ million dollars, combined single limit. Within the same time period, Respondents shall provide EPA with certificates of such insurance and a copy of each insurance policy. In addition, for the duration of the Order, Respondents shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondents in furtherance of this Order. If Respondents demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or

lesser amount, then Respondents need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

## **XXVI. FINANCIAL ASSURANCE**

**[NOTE: A financial assurance provision should be included when appropriate.]**

72. Within 30 days of the Effective Date, Respondents shall establish and maintain financial security in the amount of \$[insert estimated cost of Work] in one or more of the following forms:

- a. A surety bond guaranteeing performance of the Work;
- b. One or more irrevocable letters of credit equaling the total estimated cost of the Work;
- c. A trust fund;
- d. A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with at least one of Respondents; or
- e. A demonstration that one or more of the Respondents satisfy the requirements of 40 C.F.R. Part 264.143(f). **[NOTE: For these purposes, references in 40 C.F.R. § 264.143(f) to the “sum of current closure and post-closure costs estimates and the current plugging and abandonment costs estimates” shall mean the amount of financial security specified above. If any Respondents who seek to provide a demonstration under 40 C.F.R. § 264.143(f) have provided a similar demonstration at other RCRA or CERCLA sites, the amount for which they are providing financial assurance at those other sites should generally be added to the estimated costs of the Work for this Paragraph.]**

73. If Respondents seek to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 72(a) of this Section, Respondents shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Respondents seek to demonstrate their ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 72(d) or (e) of this Section, they shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section are inadequate, Respondents shall, within 30 days of receipt of notice of EPA’s determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 72 of this Section. Respondents’ inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Order.

74. If, after the Effective Date, Respondents can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 72 of this Section, Respondents may, on any anniversary date of the Effective Date, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Respondents shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, Respondents may reduce the amount of the security in accordance with the written decision resolving the dispute.

75. Respondents may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Respondents may change the form of the financial assurance only in accordance with the written decision resolving the dispute.

## **XXVII. MODIFICATIONS**

76. The OSC may make modifications to any plan or schedule [or Statement of Work] in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

77. If Respondents seek permission to deviate from any approved work plan or schedule [or Statement of Work], Respondents' Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondents may not proceed with the requested deviation until receiving oral or written approval from the OSC pursuant to Paragraph 76.

78. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of their obligation to obtain any formal approval required by this Order, or to comply with all requirements of this Order, unless it is formally modified.

## **[XXVIII. ADDITIONAL REMOVAL ACTION]**

[79. If EPA determines that additional removal actions not included in an approved plan are necessary to protect public health, welfare, or the environment, EPA will notify Respondents of that determination. Unless otherwise stated by EPA, within 30 days of receipt of notice from EPA that additional removal actions are necessary to protect public health, welfare, or the environment, Respondents shall submit for approval by EPA a Work Plan for the additional removal actions. The plan shall conform to the applicable requirements of Section VIII (Work to Be Performed) of this Order. Upon EPA's approval of the plan pursuant to Section VIII, Respondents shall implement the plan for additional removal actions in accordance with the provisions and schedule contained therein. This Section does not alter or diminish the OSC's

authority to make oral modifications to any plan or schedule pursuant to Section XXVII (Modifications).]

## **XXIX. NOTICE OF COMPLETION OF WORK**

80. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, including [insert list of such obligations, *e.g.*, post-removal site controls, payment of Future Response Costs, or record retention], EPA will provide written notice to Respondents. If EPA determines that any such Work has not been completed in accordance with this Order, EPA will notify Respondents, provide a list of the deficiencies, and require that Respondents modify the Work Plan if appropriate in order to correct such deficiencies. Respondents shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondents to implement the approved modified Work Plan shall be a violation of this Order.

## **[XXX. PUBLIC COMMENT]**

**[NOTE: Include this Section if any response costs are compromised under Section XV of this Order.]**

[81. Final acceptance by EPA of Section XV (Payment of Response Costs) of this Order shall be subject to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i), which requires EPA to publish notice of the proposed settlement in the Federal Register, to provide persons who are not parties to the proposed settlement an opportunity to comment, solely, on the cost recovery component of the settlement, and to consider comments filed in determining whether to consent to the proposed settlement. EPA may withhold consent from, or seek to modify, all or part of Section XV of this Order if comments received disclose facts or considerations that indicate that Section XV of this Order is inappropriate, improper or inadequate. Otherwise, Section XV shall become effective when EPA issues notice to Respondents that public comments received, if any, do not require EPA to modify or withdraw from Section XV of this Order.]

## **[\_\_\_. ATTORNEY GENERAL APPROVAL]**

**[NOTE: This Section should be used if Attorney General approval is required for Section XV of this Order because total past and projected response costs of the United States at the Site will exceed \$500,000, excluding interest, and the Order compromises a claim for past or future costs. If Attorney General approval is required, the Region should consult with DOJ during the negotiations process and obtain written DOJ approval before publishing notice of the proposed cost compromise in the Federal Register. If the Order compromises a claim, but Attorney General approval is not required because total response costs are not expected to exceed \$500,000, excluding interest, insert a finding of fact in Section IV above stating that "The Regional Administrator of EPA Region \_\_, or [his/her] delegatee, has determined that**

**the total past and projected response costs of the United States at or in connection with the Site will not exceed \$500,000, excluding interest.”]**

[\_\_\_. The Attorney General or [his/her] designee has approved the response cost settlement embodied in this Order in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).]

### **XXXI. SEVERABILITY/INTEGRATION/APPENDICES**

82. If a court issues an order that invalidates any provision of this Order or finds that Respondents have sufficient cause not to comply with one or more provisions of this Order, Respondents shall remain bound to comply with all provisions of this Order not invalidated or determined to be subject to a sufficient cause defense by the court’s order.

83. This Order [and its appendices] constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Order. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Order. [The following appendices are attached to and incorporated into this Order: \_\_\_\_\_.]

### **XXXII. EFFECTIVE DATE**

84. **[NOTE: Regions may insert specific practice and language.]** This Order shall be effective \_\_ days after the Order is signed by the Regional Administrator or his/her delegatee [if the Order includes a cost recovery compromise, include the following, “, with the exception of Section XV, which shall be effective when EPA issues notice to Respondents that public comments received, if any, do not require EPA to modify or withdraw from Section XV of this Order.”]

The undersigned representative(s) of Respondents certify(ies) that it (they) is (are) fully authorized to enter into the terms and conditions of this Order and to bind the party(ies) it (they) represent(s) to this document.

Agreed this \_\_ day of \_\_\_\_\_, 2\_\_\_\_ .

For Respondent \_\_\_\_\_

By \_\_\_\_\_

Title \_\_\_\_\_

**[NOTE: Use separate page for the following signature.]**

It is so ORDERED and Agreed this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

BY: \_\_\_\_\_ DATE: \_\_\_\_\_

Name

Regional Administrator (or designee)

Region (Number)

U.S. Environmental Protection Agency

EFFECTIVE DATE: \_\_\_\_\_